

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

ALIGN TECHNOLOGY, INC.,

Plaintiff,

v

3SHAPE A/S and 3SHAPE, INC.,

Defendants.

: CIVIL ACTION NO.

: 17-1646-LPS-CJB

ALIGN TECHNOLOGY, INC.,

Plaintiff,

v

3SHAPE A/S and 3SHAPE, INC.,

Defendants.

: CIVIL ACTION NO.

: 17-1647-LPS-CJB

Wilmington, Delaware
Thursday, April 30, 2020
Telephone Conference

BEFORE: HONORABLE LEONARD P. STARK, Chief Judge

APPEARANCES:

SHAW KELLER, LLP

BY: JOHN W. SHAW, ESQ

and

PAUL HASTINGS, LLP

BY: BLAIR M. JACOBS, ESQ., and

CHRISTINA A. ONDRICK, ESQ.

(Washington, District of Columbia)

and

Brian P. Gaffigan
Official Court Reporter

1 APPEARANCES: (Continued)

2
3 PAUL HASTINGS, LLP
4 BY: GRANT MARGESON, ESQ.
(San Francisco, California)

5 and

6 MORRISON & FOERSTER, LLP
7 BY: RICHARD S.J. HUNG, ESQ.
(San Francisco, California)

8 and

9 BARTLIT BECK, LLP
10 BY: MARK L. LEVINE, ESQ.
(Chicago, Illinois)

11 and

12 BARTLIT BECK, LLP
13 BY: JOHN M. HUGHES, ESQ.
(Denver, Colorado)

14 Counsel for Align Technology, Inc.

15 PEPPER HAMILTON, LLP
16 BY: JAMES H.S. LEVINE, ESQ.

17 and

18 PEPPER HAMILTON, LLP
19 BY: GOUTAM PATNAIK, ESQ.,
DAVID J. SHAW, ESQ., and
20 KIMBERLY E. COGHILL, ESQ.
(Washington, District of Columbia)

21 and

22 PEPPER HAMILTON, LLP
23 BY: BRITTANEE L. PETRIK, ESQ.
(Boston, Massachusetts)

24 Counsel for 3Shape A/S and 3Shape, Inc.
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2 P R O C E E D I N G S

3 (REPORTER'S NOTE: The following telephone
4 conference was held remotely, beginning at 3:16 p.m.)

5 THE COURT: Good afternoon, everybody. This is
6 Judge Stark. Who is there for Align, please?

7 MR. J. SHAW: Good afternoon, Your Honor. It's
8 John Shaw for Align. A few people to introduce between the
9 two cases.

10 For the 1646, from Paul Hastings, Blair Jacobs,
11 Christina Ondrick, and Grant Margeson have joined us.

12 For the 1647 action from Morrison & Foerster,
13 Richard Hung.

14 For both actions from Bartlett Beck, Mark Levine
15 and John Hughes.

16 And from Align, I believe we have Jeff Comeau
17 and Arthur Hseih.

18 THE COURT: Okay. Thank you very much.

19 And who is there for 3Shape, please?

20 MR. J. LEVINE: Good afternoon, Your Honor.
21 It's James Levine from Pepper Hamilton. I'm joined by
22 co-counsel, Goutam Patnaik, David Shaw, Kimberly Coghill,
23 and Britanee Petrik; and that is in both cases.

24 THE COURT: Okay. Thanks very much; and I have
25 my court reporter on the line as well.

1 For the record, it is our two related cases and
2 this is Align Technologies Inc. vs. 3Shape A/S, et al, Civil
3 Action Nos. 17-1646 and 17-1647. This is the time I set aside
4 to talk to you about the disputes arising from our recent
5 order which adopted Judge Burke's Report and Recommendation.

6 I have reviewed all the letters that have come
7 in including the two most recent ones. We heard yesterday
8 from Align so why don't we start by letting 3Shape briefing
9 outline your position on the issues.

10 MR. PATNAIK: Sure, Your Honor. This is Goutam
11 Patnaik from Pepper.

12 After receiving your initial order on this issue
13 overcoming the objections to Judge Burke's decision, we
14 received a letter from Align, an e-mail on April 15th that is
15 included as Exhibit 2 in the initial joint submission. That
16 e-mail listed requests which reach all documents relating to
17 any study of Align's patents, patent studies regarding any of
18 the accused products and all studies about any patents by
19 3Shape subsequent to the order.

20 Align also asked in that e-mail for 10 deponents
21 in very short order. For five of those deponents, we found
22 no record on Pacer of notices being served in 1646 or 1647;
23 and for others, they were individuals that were previously
24 identified only relevant to TRIOS scanners which are
25 products no longer at issue in this case.

1 Align has narrowed the products at issue in this
2 case to, for 1646, model builder and patient monitoring, and
3 for 1647, it's smile design and indirect modeling products.

4 Given the April 15th e-mail, we went back and
5 looked at the orders and thought they were overreaching
6 especially in light of the fact that the orders addressed
7 the 61 documents that were at issue in the protective
8 order that all started with the attempt to carve out those
9 documents from the cross-use agreement of the parties.

10 So the difference in scope was what created
11 this dispute regarding what had actually -- it led to what
12 had actually been previously agreed upon by the parties as
13 to the scope of any additional discovery after Judge Burke's
14 order. And the issue 3Shape has had, Your Honor, is that
15 Align has been inconsistent with what exactly the additional
16 discovery it seeks now is or should be.

17 So even if you look at the e-mail, Exhibit 7 to
18 the joint submission; this is Document 426-7; this is a
19 February 18, 2020 e-mail from Align's counsel which the
20 first one to the joint submission they characterize as a
21 memorialization, their memorialization of a meet and confer
22 on this very issue regarding the scope of documents they
23 sought to be produced. In that e-mail, and I quote, they
24 say, "First an update of document production and e-mail
25 production concerning patent agent communications uniquely

1 relevant to the products at issue in the 1646 and 1647 cases."

2 So they had narrowed the scope at least pursuant
3 to their understanding of where the parties were to the
4 products at issue in these two cases; but the earlier e-mail
5 was much broader, and then yesterday's submission by Align
6 was also much broader. They went further and they wanted
7 all communication also relating to any 3Shape agents, patent
8 analyses, and they are untethered to the products at issue,
9 the asserted patents or the parties' e-mail for the protocol
10 or any other limitation.

11 So that is the crux of the dispute right now,
12 Your Honor. We're seeking your guidance to ensure the
13 scope of any supplemental production or depositions is
14 appropriately limited to the scope of the case at hand,
15 unlike what Align is apparently currently looking for or
16 seeking, which to us appears very much like a fishing
17 expedition or a desired preview for their other pending
18 litigations.

19 THE COURT: Okay. On this notice of deposition
20 point, is that something you pointed out to me before in
21 these many letters?

22 MR. PATNAIK: No, Your Honor. I just realized
23 it today looking through Pacer, and we did it when we were
24 trying to figure out the universe of relevant deponents.

25 THE COURT: To the extent that they're saying

1 that I should understand your position now to be basically
2 an overbreadth objection, they say that that was waived long
3 ago. What is your response to that?

4 MR. PATNAIK: Well, we went back today, Your
5 Honor, and looked at the actual document request they
6 flagged in their letter yesterday. We did have relevance
7 objections to each of the requests that we thought touched
8 upon this issue, so I'm not sure how it was waived. Our
9 protective order was based on the privilege dispute, but
10 we never said that we were going to give them everything
11 untethered to the scope of this case.

12 THE COURT: Did you find that you had preserved
13 an overbreadth objection or just a relevance one?

14 MR. PATNAIK: Relevance, Your Honor. The
15 wording was that it was either -- it was relevance in the
16 document request responses.

17 THE COURT: All right. Talk, if you would,
18 about the fees. They're asking me to award probably what
19 amount to a great deal of fees. Tell me why in your opinion
20 I shouldn't do that.

21 MR. PATNAIK: Your Honor, your order I thought
22 addressed costs, and I think they added fees yesterday. We
23 had a good faith dispute, and we -- they had argued in many
24 cases that there was a fraud waiver for any time we said
25 anything about what we thought was privileged, so that was

1 one issue.

2 There was -- I need to be blunt. We thought
3 questioning our witnesses about these documents and these
4 issues, it was going to -- you can't unring that bell. That
5 is going to seep into the litigation, whether they use them
6 on subsequent questions or not, depending on how the orders
7 came out; so it didn't make sense to us. And this is the
8 same practice we did in the ITC when this issue came up,
9 and the idea that we should be sanctioned for it now when
10 we're just preserving our rights or seeking to preserve our
11 rights, we don't think it is warranted.

12 THE COURT: All right. If I agree with them on
13 what you need to produce, is May 4th still the date that you
14 would say is realistic or would you need more time?

15 MR. PATNAIK: I think we could hustle and do --
16 if it's broader than we're expecting, we could still do it
17 by May 4th.

18 THE COURT: Okay.

19 MR. PATNAIK: And I can tell, we can inform
20 both the Court and Align if we feel like we need more time.
21 We can do it, we can do it a first tranche right away on
22 May 4th that we're planning and we can quickly supplement;
23 but at this point, Your Honor, I don't think we need to
24 supplement after May 4th.

25 THE COURT: All right. Well, thank you for that.

1 We'll come back to you, but we'll hear now from Align.

2 MR. J. SHAW: Your Honor, it's John Shaw. I'll
3 talk to the broad issues on what was at issue in the
4 protective order motion and the relevance and overbreadth.

5 If Your Honor has specific questions about
6 deponents, for example, Mr. Jacobs will handle those.

7 On the big picture question, what was at issue.
8 If you go back to the protective order motion, it is clear
9 there are two things in the very first paragraph outlined by
10 3Shape:

11 First, they wanted us to return or destroy the
12 61 documents that we already had in our possession. Those
13 are the ones that say logged and put that log as Exhibit 1
14 to their motion.

15 The second item they wanted was a protective
16 order that broadly, and I'm quoting "recognizing privilege
17 and legal analysis -- legal advice/legal analysis prepared
18 by the European patent attorneys (EPAs), and foreign patent
19 practitioners."

20 They then describe the documents at issue and
21 they did it not tethered to the products or patents in the
22 case. Here is what they said, "legal analysis and advice
23 relating to European patents, global patent portfolios
24 and/or competitor patents and the context of the client's
25 products."

1 We gave a similar description in our responsive
2 brief, "studying competitive company patents and developing
3 a scanner product for the U.S. market."

4 It's correct that they did put relevance in
5 their objections on their document requests but they never
6 raised relevance to the Court at the time they're actually
7 trying to stop the documents from production. It's not
8 mentioned in their opening brief, and it's not mentioned
9 in the two briefs; that they submitted full-length briefs
10 as submitted to Judge Burke; not discussed, the words
11 "relevance" and "overbreadth" to the request, and what's at
12 issue were never mentioned.

13 The second place that confirms all this happens
14 in October when we moved to compel privilege log, because
15 the only privilege log we had in the two cases were the 61
16 documents we already had but we couldn't use because of
17 their privilege assertion.

18 They objected to the privilege log because they
19 thought it would be burdensome and their work would be
20 "significantly impacted" by Judge Burke's ruling.

21 At the hearing on this motion, Judge Hall, who
22 at that point had discovery issues before her, asked 3Shape
23 to quantify the logging burden.

24 The response was, as we described in our papers,
25 hundreds and hundreds of documents. For that reason, she

1 accepted the burdensome objection and let them off the hook
2 from logging the documents.

3 Again, though, 3Shape didn't say that logging
4 may ultimately be unnecessary because some of the documents
5 weren't relevant and that we're requesting overbroad things,
6 and there was no mention of narrowing of the types of
7 documents that were at issue in the original protective
8 order motion.

9 The third place this happens is in the motion to
10 stay in February and the reply brief in particular. Again,
11 they distinguish between the 61 documents and the broader
12 category; but again, remember, we had the 61 documents;
13 and here in the reply brief, they talk about turning over
14 potentially privileged, we say it again, "turn over highly
15 sensitive privileged communications to a major competitor."
16 They couldn't be referring to the 61 that we had but the
17 other documents that we were requesting that were at issue.

18 They then in that paper turn to discussing why
19 3Shape shouldn't produce all the materials that were at
20 issue in the protective order motion and that they
21 originally described there. Again, they don't talk about
22 some of those documents being not relevant or that there is
23 only a narrower subset but instead their rationale to stay
24 the order and stay their compliance with the "nonsensical"
25 to again to, and I'll quote again, "require 3Shape to

1 engaged in the engaged and burdensome discovery."

2 From the outset of the dispute when they brought
3 it to where we are now, until just now, 3Shape framed these
4 issues as more than just the 61 documents and more than
5 documents about the patents of the products specifically in
6 these two litigations.

7 So I'll pause before turning to the dates and
8 the deposition fee questions.

9 THE COURT: Okay. Thank you, but I don't have
10 any questions at this point. You can proceed.

11 MR. J. SHAW: Okay. So May 4 is a day that we
12 definitely need some of these documents we expect will be
13 relevant to issues in the summary judgment briefing that
14 will be argued a week from tomorrow before Your Honor, so
15 getting them Monday provides a tight but doable window for
16 us to get through them.

17 If we find things as we expect that are relevant
18 to two of the issues in that motion, we'll be asking 3Shape
19 for their consent and then Your Honor for your approval to
20 file something short to put those in front of Your Honor
21 because we do believe they'll impact the motions.

22 On the fees question, additional relevance in
23 depositions happens all the time. The rules are set up in a
24 way that get the witness under oath, you ask all the issues
25 that may be there and sometimes issues aren't relevant and

1 they're -- at the time, as you go through the pretrial and
2 get to trial, those things are excised and not used.

3 In this case, with the privilege, we tried to
4 do the same thing and we provided additional safeguards as
5 are permitted by the federal rules of evidence and civil
6 procedure so that any materials that would in the end have
7 turned out to be privileged, that they would have been used
8 and would have been set aside, but that was refused and now
9 we're faced with the additional cost and fees and impacts of
10 getting that work done in a shorter time.

11 I should also add there that there are fees and
12 costs that aren't as easily quantifiable that results from
13 where we are today, for example, putting together on an
14 expedited basis, review of documents, getting ready for Your
15 Honor for the hearing. That is not so easily quantifiable,
16 but certainly we think impacts the need and the reasons for
17 a sanction such as paying our fees and costs and getting the
18 deposition work done before the trial.

19 And that's all I have, Your Honor.

20 THE COURT: All right. On the depositions, I
21 don't think I need it item by item about the ten, I think it
22 is, that you want, but just generally the argument that the
23 notices of deposition may not have been served and in some
24 ways the case is narrower now than it was back when this
25 whole dispute arose, so maybe you should be able to limit

1 things a little bit.

2 MR. JACOBS: Your Honor, Blair Jacobs.

3 In October of 2018, we served requests for
4 production of documents and we served deposition notices
5 with very, very similar scope; and the request that we put
6 forth was "all nonprivileged 3Shape communications
7 concerning the analysis or examination of Cadence or Align
8 patents." We provided that to you in the exhibit we
9 provided yesterday. And then all "3Shape communications
10 involving European patent agents, including, but not limited
11 to, two that we were aware of contain the analysis of
12 Cadence or Align products or patents or other competitors
13 products or patents.

14 Now, that defines the scope of what we were
15 looking for; and we weren't looking to narrow it to only the
16 products and patent in this case, Your Honor, we made this
17 clear during meet and confers with 3Shape, because if they
18 took an action with regard to another product not involved
19 in this case and they didn't take that similar action or
20 they took a different action with regard to a product or a
21 patent involved in this case, that is highly relevant to
22 willfulness, inducement, and/or a number of excludable
23 defenses that they have raised. They have raised these
24 laches and these equitable estoppel defenses that go to
25 their state of mind.

1 But, Your Honor, even in the summary judgment
2 briefing; and we have our hearing next week; one of their
3 oppositions regarding three patents in the 1646 case was
4 that we did not have sufficient evidence of their state of
5 mind to demonstrate inducement. That is why all of this
6 evidence that we're looking for regarding any patent agent
7 communications or freedom to operate studies would be relevant.

8 As to the notices of deposition, we noticed the
9 five that we knew had knowledge because we had been shut down
10 in depositions. We had asked on a number of occasions to take
11 those depositions provisionally and we had been shut down.

12 The other five, Your Honor, came up in the
13 documents, the 61 documents that were provided to Judge Burke
14 as part of the argument relating to the protective order.

15 And so those individuals became relevant when
16 3Shape put them in front of Judge Burke as part of that
17 protective order dispute. But, Your Honor, in part, there
18 is other individuals likely that we'll need to know this
19 because we don't have the documents or the communications at
20 all that we have requested; and once we get those documents
21 and communications, there may be a few other people who are
22 relevant, who were involved in these studies, and so that is
23 why we're looking for the additional depositions.

24 And, Your Honor, we started writing -- I have
25 communication that is in the record as of May of 2019

1 indicating not only that we were willing to provisionally
2 take these depositions, but we also cited the Federal Rules
3 of Civil Procedure and the Federal Rules of Evidence. In
4 particular, we cited Rule 502(d). And 502(d) was passed so
5 that you could provisionally provide this type of evidence.

6 If they would have sought that type of
7 protection, Align would have never opposed that type of
8 protection. So the fee issue here doesn't really have to do
9 with whether this protective order that they were seeking
10 was appropriate or not; and that is how they framed it
11 completely. It really goes more towards have they wasted
12 the Court's time and a party's time by forcing this second
13 round of deposition. And when you look at the long line of
14 communication and the whole history here of us trying to get
15 the depositions taken provisionally, it's clear that their
16 conduct and their actions have necessitated unnecessarily
17 the second round of depositions.

18 THE COURT: Okay. Thank you very much.

19 Is there anything else Align wanted to say?

20 MR. JACOBS: No. If Your Honor has any additional
21 questions relating to any of the meet and confers or anything
22 of that nature, we're happy to provide background, but I think
23 we discussed our points very, very well.

24 THE COURT: Okay. Thank you.

25 Then back to 3Shape to add whatever you like.

1 MR. PATNAIK: I guess Your Honor, let me bring
2 up the depositions.

3 The appropriate scope. We maintain that the
4 appropriate scope of the depositions is tethered to the case
5 and the scope of the case. Counsel is referring to comments
6 that he already has from depositions of 3Shape witnesses
7 that they have a general practice with the products.

8 The fact they have that practice as he already
9 has via deposition testimony, the idea that he needs to see
10 all of the freedom to operate across all products and all
11 patents seems a bit overkill, Your Honor, in light of the
12 proffered reason why he wants it, if he wants to show if
13 that practice wasn't followed or not for these products at
14 issue.

15 If he gets the freedom to operate and the other
16 analyses for the products at issue and the patents at issue,
17 I think he has whatever pieces he needs for his defenses to
18 our equitable defenses, so I don't know that he needs the
19 broad brush of discovery that he says he needs for that
20 issue, also the motions practice next week.

21 As far as relevance, Your Honor, I mean that
22 objection was maintained in our document request responses
23 and the confusion also lies inside -- I mean even the
24 communication on this issue that counsel is referring to has
25 been inconsistent. I referred earlier to that Exhibit 7 in

1 the Document 426. They were clear that they were focused
2 on the products at issue in this case, which makes sense.
3 So the idea that we would further object to relevance in any
4 event, it just seems like it got broader with time, Your
5 Honor.

6 THE COURT: Okay. Excuse me. Thank you. Thank
7 you for the discussion.

8 The time has come -- you may say it's well past
9 time for these disputes to be behind all of us. Lots of
10 time has been spent by the parties and by the Court on the
11 disputes today and the ones that have given rise to what
12 we're talking about today.

13 Obviously, Judge Burke did a lot of work; Judge
14 Hall done some; I've done a fair amount of work. There has
15 been briefs; there has been objections; there has been
16 letters; there has been numerous discussions; and these
17 cases are moving along. As you've referenced, we have a
18 motions hearing next week. We have trials coming up. So I
19 recognize I need to just make some decisions so you all know
20 what your obligations are, and the cases can move forward on
21 the schedule that they are currently on.

22 So that means, while I have delved into the
23 weeds in getting ready for today, my decision is being made
24 at even more so at the big picture level. And big picture,
25 I see there as being three disputes: the first one about

1 basically the documents and depositions, second one about
2 the timing of producing those, and the third one about the
3 fees.

4 And for reasons I'm going to explain but only
5 briefly, given the long record that we all have on these
6 issues already, I am siding with Align on issues 1 and 2 and
7 I am siding with 3Shape on issue 3.

8 So what that means is Align is going to get the
9 discovery that they are seeking but I'm not going to shift
10 fees and costs.

11 So just a few thoughts about how I have reached
12 that conclusion.

13 I do think that what was at issue in the
14 protective order dispute that was in front of Judge Burke
15 for some time was at least by implication much more than
16 just the 61 documents. And that reality I think is well
17 reflected in a careful review of the briefs, the letters,
18 the meets and confers that are memorialized through
19 declarations and other things in the record. It was never
20 just about 61 documents. And the decision there ultimately
21 as far as I mean has implications, implications that are
22 consistent with what Align has argued and, therefore, has
23 informed my decision that the additional discovery sought by
24 Align needs to be provided by 3Shape.

25 I am not entirely or even principally focused on

1 the past in reaching this decision, although to the extent
2 I must, I do think that Align's characterization of the
3 positions the parties took and how we got to where we are
4 today is much closer to what appears to be the reality than
5 the somewhat different story that 3Shape has tried to
6 portray for me.

7 But at least as importantly and probably more
8 importantly, I'm really focused on where we are now and
9 where these cases should go going forward. And in that
10 regard, Align's request for additional discovery all seems
11 reasonable to me. It's proportional to the needs of these
12 cases. Mind you, it's two very large patent cases. And
13 it all seems relevant to me for at least the reasons
14 articulated in Align's most recent letter, and we heard a
15 little bit of it today.

16 So even assuming that the relevance objection
17 was properly preserved throughout all the litigation that
18 got us to today, I would overrule -- am overruling that
19 relevance objection as not being meritorious in light of
20 everything else about these cases. I don't think there is
21 an overbreadth objection that was preserved. In any case,
22 3Shape has not made a showing, at least to my satisfaction,
23 that what I am ordering in terms of discovery is overbroad.

24 So to try to be just a little bit concrete on
25 these issues 1 and 2, I'm awarding the relief; and to some

1 extent, you could view it as clarification, but I'm awarding
2 the relief that Align asked for in its letter of yesterday.

3 So on page 1, I'm ordering 3Shape to produce all
4 nonprivileged documents, e-mails and communications relating
5 to its agents, patent analyses as Align has long requested;
6 and, two, log any such documents it claims remain privileged
7 despite the Court's Order.

8 And then on page 3, I'm further ordering that
9 this be done by May 4th, which both parties tell me is an
10 acceptable date; and by May 4th, 3Shape produce (A), the
11 documents it withheld; (B), all other responsive
12 nonprivileged documents and e-mails regarding patent agent
13 communications not previously produced; (C), a complete and
14 accurate privilege log; and (D), a certification that all
15 responsive documents have been produced or logged.

16 I further order that the parties meet and confer
17 very expeditiously, and that 3Shape timely schedule the
18 relevant depositions that have been requested by Align.

19 On issue 3, the fees and the costs, that's the
20 toughest issue that you put before me today. I do think that
21 the record will show that there has been some unnecessary
22 costs incurred by Align as a result of how 3Shape handled this
23 mess of discovery disputes over the last year or so. And
24 that's unfortunate, but I'm not persuaded on the whole that
25 it is such that it warrants me shifting any fees and making

1 3Shape pay financially.

2 I understand that 3Shape appears to have believed
3 it was acting not only in good faith but consistent with what
4 it thought was necessary to preserve its rights and consistent
5 with what it argues at least in the course of dealing between
6 the parties in at least the ITC litigation; and I do realize
7 that the parties have been engaged and are engaged in a great
8 deal of litigation with one another; so I am not going to
9 shift the fees or the costs.

10 So that's my ruling. What else? Any questions
11 about that or do you need anything else further from me?
12 First from 3Shape.

13 MR. PATNAIK: Sure. This is Goutam Patnaik,
14 Your Honor. A couple questions.

15 You raised the e-mails and the language in their
16 letter about e-mails.

17 I want to confirm the parties have been acting
18 in all these cases with under e-mail protocols that specify
19 custodians and hit search terms. I just want to make sure
20 that those are the e-mails we're talking about, and it is
21 not broader than what the parties have already been doing.

22 THE COURT: All right. Let me hear from Align
23 on that.

24 MR. JACOBS: Your Honor, when they ran -- this
25 is Mr. Jacobs. When they ran their e-mail searches, they

1 undoubtedly -- we put in terms relating to this issue, so to
2 the extent that they uncovered e-mails relating to these
3 issues as part of their e-mail searches, those should be
4 produced. We are not requesting that they run any
5 additional e-mail searches beyond the scope of what they
6 have already run.

7 It is our assumption, because we put terms in
8 our e-mail search term requests specifically focused on
9 these patent agent communications, that they will have
10 already uncovered them as part of their process; and in
11 any event, Your Honor, your certification requirement will
12 require them to go back and double check and make sure that
13 they have uncovered the e-mails that are relevant and
14 responsive here.

15 THE COURT: Okay. Thank you.

16 Does that answer the question?

17 MR. PATNAIK: Yes, Your Honor. I just wanted
18 to confirm that we're still working under the protocol, the
19 paradigm, and we are; and we are fine with that.

20 One other issue I just wanted to flag for
21 everyone while we're on the phone. [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]
2 [REDACTED] so there may be
3 challenges with getting his deposition promptly; and I
4 wanted to make sure that everybody knew that.

5 THE COURT: Okay. I, of course, hope than he
6 feels better soon. I'm confident that Align will be
7 reasonable in what they request. If somebody is sick, and
8 obviously all of us are limited right now with our ability
9 to travel, you know, nothing about my order is meant to deny
10 those realities. I'm just confident that the parties can
11 work through them cooperatively.

12 Anything else from 3Shape?

13 MR. PATNAIK: No, Your Honor. I don't think so.

14 THE COURT: Okay. Any questions or other issues
15 from Align?

16 MR. JACOBS: Your Honor, this is Blair Jacobs.
17 I do have one or two.

18 First, I wanted to clarify my prior response. I
19 think that it was stated that 3Shape should search that and
20 confirm in their required confirmation that they have
21 searched non-email repositories for all responsive
22 information.

23 I think that they have agreed to that. But the
24 question that I have is, as Your Honor knows, our summary
25 judgment hearing and *Daubert* hearing is next Friday.

1 We are in the process of preparing, as you might
2 imagine; and there are two motions, one filed by Align and
3 one filed by 3Shape; where these documents that we will be
4 receiving this production, we will be receiving are directly
5 implicated.

6 And so as a result of that, I would like to
7 respectfully request that we can agree to a time on Monday
8 that we receive the documents. I would prefer to have them,
9 you know, by 4:00 or 5:00 o'clock Eastern Standard Time
10 because we're going to need to process them, analyze them,
11 and to figure out a way to supplement, assuming that 3Shape
12 will not be opposing our papers now that we have this new
13 information that we did not have when we prepared our papers
14 with regard to the motions in the first place.

15 And so that's the first issue I wanted to present.

16 Tied to that, we wanted to make sure that it was
17 acceptable to Your Honor that if we do need to supplement,
18 based upon this new information that we received, that it
19 would be okay providing brief supplementations prior to the
20 hearing so that 3Shape can see what it is that we're
21 pointing to rather than bringing that up on Friday at the
22 hearing.

23 THE COURT: Right. Okay. What is 3Shape's
24 response?

25 MR. PATNAIK: I think supplementation, if we

1 could -- I mean I know it's not fair when they haven't seen
2 the documents, but if we can do it by Wednesday so we can
3 put in a brief response by Thursday, that would make sense,
4 but I just don't know how realistic that is.

5 THE COURT: Right. Can you get your production
6 to them by 4:00 o'clock Eastern Time on Monday?

7 MR. PATNAIK: So, Your Honor, the only thing
8 I'm a little concerned about is that we have what we're
9 perceiving as an expanded view of the world as far as what
10 is relevant now.

11 We can definitely do a good chunk of those that
12 is associated with the products at issue and the patents at
13 issue in this case. It's the other that may take a little
14 bit more time; and I just don't want to overpromise on the
15 other. We can definitely do the first tranche Monday at
16 4:00 p.m. It's the rest that concerns me.

17 THE COURT: All right. Mr. Jacobs, what do you
18 say to that?

19 MR. JACOBS: So we want to be reasonable, of
20 course, Your Honor. Now, it takes some time for us to
21 process these documents after they have been received, so
22 assuming we receive some at 4:00 p.m. on Monday and some at
23 some point in time later than that, we have to process them
24 electronically, make them available for review. That takes
25 some period of time.

1 And so if we could have until Thursday, say, at
2 11:00 a.m. or noon to file any supplementation, that seems
3 more appropriate because we're looking at a fairly significant
4 volume of documents that we're going to have to process and
5 review; and also it sounds like they're going to be staggered;
6 so I think that we can make that work assuming that we have,
7 by Tuesday, the end of the document production that 3Shape is
8 talking about here. You know, our assumption is they would
9 have had this gathered already, but I understand that they
10 want to be thorough and they want to make sure they go back
11 and comply with your order.

12 And along those same lines, Your Honor, it is
13 quite possible that when we look at these documents, there
14 may be additional depositions that are required, you know,
15 new names that show up in the document. We wanted to make
16 sure that the scope of Your Honor's order included new
17 depositions which have not been noticed to this point of
18 course that result from the production of these documents
19 that have been withheld.

20 THE COURT: All right. Any further response
21 from 3Shape?

22 MR. PATNAIK: On the additional depositions,
23 Your Honor, of course, in light of your order, we'll be
24 reasonable. We just want an opportunity to meet and confer
25 and make sure they're really necessary given the expediency

1 that these depositions have to be done.

2 THE COURT: Okay. So here is how we'll proceed
3 with respect to all of this.

4 3Shape is to produce all of the responsive
5 material consistent with my order today that it can by no
6 later than 4:00 p.m. Monday East Coast time; and if it turns
7 out that some of it can't be done by then, then you have 24
8 extra hours, until Tuesday at 4:00 p.m., to finish that up;
9 but to be clear, you got to produce what you can by Monday
10 at 4:00 p.m. There is no holding stuff back until Tuesday.

11 I can't imagine that you all will not take
12 advantage of the opportunity to file something, and so I'm
13 just going to go ahead and give you leave to do so.

14 So by Thursday, no later than 10:00 a.m., Align
15 can file up to a five-page supplement with respect to the
16 two motions focused on what, if anything, new you have
17 learned from the production on Monday and possibly Tuesday;
18 and 3Shape can respond by 9:00 a.m. on Friday, similarly,
19 with up to five pages.

20 All of this, if you do it, will be helpful to
21 me and will also help the parties be better prepared to
22 understand what each of you is likely to argue in response
23 to the new information.

24 In terms of new depositions, I do recognize
25 and do not mean to preclude that it may be possible that

1 additional depositions are necessary if there is information
2 that is to be produced to Align; so the new depositions
3 would have to be necessitated by the new discovery that I
4 have ordered be produced, and the new depositions are not
5 to be noticed until after the parties meet and confer to
6 hopefully resolve any disputes it may have.

7 I think that resolves everything that you have
8 said.

9 Mr. Jacobs, anything further?

10 MR. JACOBS: No. Thank you very much, Your
11 Honor.

12 THE COURT: Any questions or anything further
13 from 3Shape?

14 MR. PATNAIK: No, Your Honor. I think we're
15 set.

16 THE COURT: All right. Thank you very much.
17 We'll talk to you next Friday. Be safe. Good-bye.

18 (Telephone conference ends at 3:55 p.m.)
19

20 I hereby certify the foregoing is a true and accurate
21 transcript from my stenographic notes in the proceeding.

22 /s/ Brian P. Gaffigan
23 Official Court Reporter
24 U.S. District Court
25

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